IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA, STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS,	)	**CIVIL ACTION NOs. 99-30225, 99-30226, 99-30227-MAP (Consolidated)**
Plaintiffs,	)	**Leave to file Granted April 12, 2013, Doc. No. 196**
v.	)	
GENERAL ELECTRIC COMPANY,	)	
Defendant.	)	

RESPONSE OF THE UNITED STATES TO GENERAL ELECTRIC COMPANY'S MOTION FOR JUDICIAL REVIEW OF DISPUTE REGARDING COST REIMBURSEMENT UNDER CONSENT DECREE

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INTRODUCTION

Under the Consent Decree entered by this Court in October 2000 ("CD" or "Decree"), the General Electric Company ("GE") is required to reimburse approximately $1.2 million of the $3.7 million in response costs incurred by the United States under the Decree during fiscal year ("FY") 2011.[1] These reimbursable costs fall within the Decree's definition of "Future Response Costs," which include "all" costs incurred "pursuant to" the Decree, excluding only certain defined capped categories of costs such as "Oversight Costs" and "Future Rest of River Capped Response Costs." CD ¶4. Under the Decree's billing procedures, GE is required to reimburse EPA for all such Future Response Costs. CD ¶95.

GE argues that EPA improperly "shoehorned" almost all of the $1.2 million (all but about $56,000) into the Future Response Costs category when such costs allegedly fall within the Decree's definitions of certain capped costs, which are no longer reimbursable due to the cost caps. GE is mistaken. As discussed below, a complete review of the Decree terms – one that does not omit relevant provisions – and a fair consideration of the facts, demonstrate that the costs at issue do not fall within any of the capped categories.

GE argues, alternatively, that EPA did not incur the costs at issue "pursuant to" the Decree because EPA did not follow the process allegedly set forth in the Decree for EPA's proposal of a preferred cleanup for a portion of the Housatonic River defined as the "Rest of River ("ROR")." GE claims no reimbursable work can be undertaken by EPA until EPA first

[1] Relevant pages of the Decree are attached as Exhibit ("Ex.") 1 hereto. EPA's FY 2011 runs from October 1, 2010 through September 30, 2011.

makes a formal decision regarding GE's Revised Corrective Measures Study ("RCMS"). But there is no "red light/green light" prohibition in the Decree requiring EPA to formally act on the RCMS before *initiating* its process of developing its preferred cleanup or remedial action ("Remedy") for the Rest of River – and there is similarly no limitation on recovering those Future Response Costs. EPA's costs related to developing a preferred Remedy were incurred in carrying out the Decree, and are consistent with governing environmental statutes, associated regulations, and guidance. Indeed, in the spring of 2012, *GE* requested that EPA participate in "Technical Discussions" regarding EPA's potential recommended Remedy, and *GE* did not insist that EPA act on the RCMS prior to initiating these Technical Discussions. Declaration of Dean Tagliaferro ("Tagliaferro Dec.") ¶22, Ex. 2. In sum, EPA's Remedy selection process is consistent with the Decree, and EPA's costs incurred in connection with that process are fully recoverable.

To place this dispute in perspective, EPA, to date, has not recovered over $141 million in costs incurred under the Decree that are not reimbursable because of a cost-sharing agreement related to a portion of the work at the Site, and caps on certain cost categories.[2] In FY 2011, EPA's total response costs were $3,703,427.[3] EPA allocated the majority of these costs, about $2.5 million, or roughly 67%, to capped (unrecoverable) cost categories such as Oversight Costs.

[2] For example: EPA has already allocated (through FY 2012) about $74.5 million of its response costs to the capped cost category "U.S. Future Rest of River Capped Response Costs," although GE was only obligated to reimburse $14.5 million of such costs; EPA has already allocated about $25.5 million of its response costs to another capped cost category, "U.S. Oversight Costs," although GE was only obligated to reimburse $11 million of such costs. Tagliaferro Dec. ¶30.

[3] These costs exclude costs related to a portion of the Site known as the 1.5 Mile Reach of the River (approximately $265,000). Tagliaferro Dec. ¶31.

This allocation process included re-allocations made during administrative dispute resolution invoked by GE under the Decree. *Id.* ¶31. After unsuccessful attempts to resolve the issues, GE filed its motion for judicial review before this Court. Doc. No. 188. EPA is seeking approximately $1.2 million in Future Response Costs mostly for work related to EPA's efforts to prepare a preferred Remedy – this is 33% of EPA's total FY 2011 costs. GE claims only approximately $56,000, or roughly 1.5%, of EPA's FY 2011 costs are recoverable. *See* Chart, Ex. 3; Tagliaferro Dec. ¶32. Given these facts, GE's assertion that EPA attempted to improperly "shoehorn" capped costs into the uncapped category rings hollow.

To determine whether the costs at issue are Future Response Costs, the Court need only answer two questions: (1) were the costs incurred pursuant to the Decree; and (2) do the costs fall within any of the capped categories. Here, GE must reimburse the United States for its $1,239,108 in 2011 FY Future Response Costs, plus Interest. CD ¶¶ 4, 101.

STATEMENT OF FACTS

The following summarizes relevant Decree terms and Site history.

I. Summary of relevant Decree provisions.

A. Cost definitions.

GE agreed to reimburse EPA for certain costs under the Decree. These costs are divided into several cost categories, of which three are relevant to this dispute: U.S. Future Response Costs ("Future Response Costs"); U.S. Oversight Costs ("Oversight Costs"); and U.S. Future Rest of River Capped Response Costs ("Future ROR Capped Response Costs"). The latter two cost categories are capped, and GE has already reimbursed EPA for the full amount of costs payable under these two categories.

Future Response Costs is defined to include "all" costs incurred pursuant to the provisions of the Decree that are not otherwise within certain capped categories of costs: namely,

> **… all** direct and indirect costs that EPA and **DOJ** Incur pursuant to the provisions of this Consent Decree, **including but not limited to** costs Incurred to enforce the Consent Decree (including dispute resolution), the costs incurred pursuant to Sections X (Review of Response Actions), XIII (Access and Land/Water Use Restrictions) (including the cost of attorney time and monies paid to secure access and/or to secure or implement land/water use restrictions, including the amount of just compensation)… **non-field work** costs incurred for preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action (including responding to public comments thereto), and costs Incurred to develop plans or reports pursuant to the provisions of this Consent Decree that do not fall within the categories of costs excluded from U.S. Future Response Costs by the last sentence of this definition, together with any accrued Interest…U.S. Future Response Costs shall not include U.S. Oversight Costs, U.S. Future Rest of River Capped Response Costs, U.S. Future Additional Sampling Costs, U.S. Rest of River Oversight Costs, U.S. Post Removal/Groundwater Monitoring Costs, or the U.S. 1½ Mile Reach Removal Action Costs.

CD ¶4 (emphasis added). The definition of Future Response Costs is thus a "catch all" definition that includes "all" costs incurred pursuant to the Decree, excluding only certain capped categories of costs, such as Oversight Costs and Future ROR Capped Response Costs.

Oversight Costs include, in relevant part, costs that EPA incurs for:

> reviewing proposals, reports, studies, and other deliverables submitted by [GE] under the [RCRA Permit], conducting shadow or supplemental studies **for the studies to be conducted by [GE] under that Permit,** and **otherwise overseeing** [GE's] activities under that Permit, all prior to the modification of that Permit to select the Rest of River Remedial Action pursuant to Paragraph 22.p. of [the Decree]," including all "community relations costs, … **insofar as such costs are Incurred for the activities described in the first sentence of this definition**.

CD ¶4 (emphasis added). This category of costs is capped and only applies to "overseeing" or supervising GE's work, or to conducting shadow or supplemental studies for work required to be conducted by GE.

Future ROR Capped Response Costs include, in relevant part, costs that EPA incurs before it selects a final Remedy pursuant to Paragraph 22.p. of the Decree:

> in connection with studying or otherwise investigating the Rest of River and/or **all field work** to support the preparation, development, and selection of the Rest of River Remedial Action … [including, but not limited to] peer input, peer review …, insofar as such costs are Incurred for the activities described in the first sentence of this definition.

CD ¶4 (emphasis added).

B. The Decree provisions related to the timing of Remedy selection.

The Decree does not prescribe that EPA make a decision on the RCMS before starting to develop a preferred Remedy. Decree Paragraph 22.n provides:

> [u]pon satisfactory completion of the [RCMS] in accordance with the [RCRA Permit], EPA will **issue** a Statement of Basis and a draft modification to the [RCRA Permit], which will set forth the proposed Remedial Action for the Rest of the River….

(emphasis added).[4] This provision refers to EPA's *issuance* of a proposed Remedy (the Statement of Basis) for formal public comment, which has not yet happened. It does not require EPA to formally approve or disapprove the RCMS before beginning its Remedy selection process. Similarly, the provisions of the Permit that address EPA's action on the RCMS concern EPA's approval or disapproval of the RCMS; the Permit does not limit the timing of EPA's preparation of a proposed Remedy. Permit Section II.H.[5]

[4] The RCRA Permit is an appendix to the Decree and it spells out additional details regarding the Remedy selection process. CD Appendix G; Permit, Ex. 4.

[5] "After [GE] submits the [RCMS] Report, EPA will either approve, conditionally approve, or disapprove the Report." Permit, § II.H.

C. Community Relations and public comment.

The Decree contains several provisions regarding community relations and public comment. For example, under the Decree: EPA will develop a community relations plan, and GE will cooperate with EPA in implementing that plan, CD ¶213; the Parties will cooperate with the Citizens Coordinating Council ("CCC"), a concerned community organization, CD ¶214; and public comment is required before EPA finalizes any cleanup decision under the Decree. CD ¶¶4, 22.n (ROR Remedy decision); CD ¶10 (Permit modification); CD ¶220 (public comment on the Decree, including cleanup decision selected for certain portions of the Site).

II. EPA's Site-related activities and billing for those activities.

When the parties signed the Decree in 1999, EPA had not chosen a Remedy to address ROR contamination, including the stretch of River downstream of the confluence of the East and West Branches of the Housatonic River, in Pittsfield, and continuing into Connecticut. The Decree envisions that EPA will select a ROR Remedy and that GE will implement it. The Decree spells out GE's obligations and rights in EPA's Remedy selection process, including additional details set forth in a reissued permit under the Resource Conservation and Recovery Act ("RCRA Permit") appended to the Decree. CD ¶¶4 (definition of Reissued RCRA Permit), 22, and Appendix G; Reissued RCRA Permit, Ex. 4. The Remedy will be selected as a modification to the RCRA Permit and implemented as a CERCLA Remedial Action. CD ¶22.z. EPA is currently engaged in the Remedy selection process.[6]

GE and EPA initiated the study and investigation of the River and its contamination years

[6] Other portions of the Site have been, or are being, cleaned up under the Decree. Tagliaferro Dec. ¶¶49-50.

ago, including the development of possible "corrective measures" to address contamination in the ROR. In March 2008, GE submitted to EPA a Corrective Measures Study ("CMS") which includes its comparative analysis of "corrective measures," or ROR cleanup alternatives. Tagliaferro Dec. ¶4. EPA solicited public input on the CMS, reviewed the CMS, and ultimately provided GE with comments on the CMS, including a request for additional information and a supplement to the CMS.[7] EPA's costs of reviewing and overseeing GE's work on the CMS were not allocated to Future Response Costs, but to the Oversight Costs category and any amount over the cap was not recovered from GE. (To date, EPA has not recovered approximately $14.5 million in total Oversight Costs.) Tagliaferro Dec. ¶¶30, 39.

In response to EPA's review of the CMS, in October 2010, GE submitted to EPA its Revised Corrective Measures Study ("RCMS"), and EPA immediately solicited public input on the RCMS. EPA allocated its costs associated with reviewing the RCMS again to the capped "Oversight Costs" category, not to Future Response Costs. *Id.* ¶39.

Beginning in late 2010, EPA turned to a separate and critical task. With the primary goal of developing a preferred Remedy, EPA Region 1 (New England Office) initiated certain public outreach work, which included informing the public, and considering community input, regarding the ROR and potential ROR cleanup alternatives. As part of this outreach effort, EPA conducted interviews known as the "Situation Assessment," workshops, and an interactive workshop known as a "charrette." This process of public dialogue occurred from November 2010 through May 2011, and helped to inform the Region's decision-making regarding a

[7] EPA's comments are available at http://www.epa.gov/region1/ge/thesite/restofriver-reports.html#CMS.

preferred Remedy. *Id*. ¶¶7-12. EPA guidance encourages such public outreach efforts.[8]

After conducting the Situation Assessment, workshops, and charrette, Region 1 presented its preferred Remedy to EPA's National Remedy Review Board ("NRRB"). Tagliaferro Dec. ¶16. The NRRB promotes consistent and cost effective cleanup decisions and helps ensure that proposed remedies are consistent with law, regulations, policy and guidance.[9] The NRRB process here was conducted in connection with EPA's development of a preferred Remedy. Tagliaferro Dec. ¶17.

After the NRRB process, EPA met with the Commonwealth of Massachusetts and the State of Connecticut (collectively, "the States") to obtain input on the remedial alternative being considered by EPA. Upon completion of these meetings with the States, EPA issued a Status

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[8] Both RCRA and CERCLA guidance encourage early public outreach: For CERCLA guidance see: *Incorporating Citizen Concerns into Superfund Decision-making*, OSWER Directive 9230.0-18, at 2 ¶1 (Jan. 21, 1991) ("***Carefully considering citizen concerns before selection of a preferred remedy will lead to better decision-making***.") (emphasis added), Ex. 8; *Early & Meaningful Community Involvement*, OSWER Directive 9230.0-99 (Oct. 12, 2001) (early community involvement in cleanup decisions encouraged), Ex. 9; Office of Emergency & Remedial Response, EPA, *Superfund Community Involvement Handbook*, No. 540-K-05-003, at 31 (Apr. 2005), *available at* http://www.epa.gov/superfund/community/cag/pdfs/ci_handbook.pdf (EPA should ensure that community has every opportunity to participate in deciding upon proposed remedial action); Community Involvement University, EPA, *CIU Brochure*, at 16 (Aug. 2012), *available at* http://www.epa.gov/superfund/community/pdfs/CIU_Brochure_Aug_2010_FINAL.pdf (endorsing workshops and situation assessments to facilitate community involvement).

RCRA guidance calls for "agencies and facilities to make public participation activities under the RCRA system consistent with those activities required under Superfund." RCRA Public Participation Manual, Chapter 4: Public Participation in RCRA Corrective Action Under Permits and § 3008(h) Orders, at 4-3 (1996), *available at* http://www.epa.gov/osw/hazard/tsd/permit/pubpart/chp_4.pdf. During remedy selection, agencies are to provide a public hearing if a member of the public requests one or at the agency director's discretion, and they should consider holding workshops or informal meetings. *Id.* at 4-14–4-15.

[9] S*ee National Remedy Review Board Criteria Revision*, OSWER Directive 9220.0-27, at 1 (March 21, 2005) (NRRB "will review proposed cleanup plans"), Ex. 10; Elliott P. Laws, EPA, *Formation of National Superfund Remedy Review Board*, at 1 (Nov. 28, 1995), *available at* (http://www.epa.gov/superfund/programs/nrrb/11-28-95.htm); NRRB, *Basic Information*, http://www.epa.gov/superfund/programs/nrrb/index.htm ("[NRRB] reviews proposed Superfund cleanup decisions").

Report in May 2012 updating the public on EPA's current thinking about a potential Remedy. EPA's costs associated with this work were incurred primarily in FY 2012 and are not part of this dispute. *Id.* ¶¶20, 21.

EPA has yet to issue its decision on the RCMS in part because, in the spring of 2012, GE requested that EPA meet with GE to engage in "Technical Discussions" about EPA's current thinking on a proposed Remedy. GE requested that EPA refrain from issuing its proposed Remedy decision for formal public comment, until GE had further opportunity to meet with EPA to discuss the issues. GE did not insist that EPA act on the RCMS prior to engaging in these Technical Discussions. EPA agreed to these discussions in August 2012 and they are continuing, including with high-level management officials within GE and EPA to discuss issues related to EPA's selection of a proposed Remedy. *Id.* ¶¶22, 26-27.

STANDARD OF REVIEW

GE argues that interpretation of the Decree is governed solely by principles of contract interpretation. Memorandum in Support ("GE Mem.") 8–9, Doc No. 191. But this Decree is not a contract between two private parties. The Decree arose under statutes empowering the federal and state governments to protect the environment, public health and welfare; and included a process of public comment and review, with its ultimate approval subject to a finding by this Court that the Decree was fair, reasonable, and in the public interest. Court Order, Ex. 5. The interpretation and administration of the Decree will have substantial impact on the environment, public health and welfare. And the administration of the Decree may span decades, as construction work to clean up hazardous substances in the ROR has not begun. Tagliaferro

Dec. ¶48. As such, interpreting the Decree is not the same as interpreting a private party contract.[10] In similar cases, the First Circuit recognizes that district judges are granted certain discretion in interpreting public law decrees to best achieve their complex goals.[11] In the context of this public interest Decree, EPA's position here is supported by the text of the Decree, and is consistent with this Court's finding that the Decree was in the public interest. To the extent that this Court finds that any terms are ambiguous, this Court may interpret such terms in the context of achieving the Decree's public interest objectives.[12]

ARGUMENT

GE argues that EPA improperly allocated certain FY 2011 costs to the Future Response Costs category under the Decree.[13] In the alternative, GE argues that EPA failed to follow the

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[10] *See, e.g., F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico,* 449 F.3d 185, 192 (1st Cir. 2006) (granting deference to district court judge related to involvement in public interest decree); *AMF Inc. v. Jewett*, 711 F.2d 1096, 1101 (1st Cir. 1983) (in contrast with private party contracts, interpretation of public law decrees may require a more flexible approach).

[11] *See, e.g., Mass. Ass'n of Older Ams. v. Dep't of Pub. Welfare*, 803 F.2d 35, 38 (1st Cir. 1986) (in public law litigation, "broad 'judicial discretion may well be crucial' for the district judge to secure 'complex legal goals.'" (citation omitted)); *see also United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 517 (1st Cir. 1996) (upholding district court's interpretation of CERCLA decree, including where defendant's interpretation would be "contrary to the public interest" in giving up too much to receive too little for the public).

[12] The cases cited by GE are not inconsistent with such discretion. In those cases, the district courts were not exercising discretion to interpret ambiguous terms in a manner otherwise consistent with the decree to achieve its public objectives: *United States v. Armour & Co.*, 402 U.S. 673 (1971); *Ricci v. Patrick*, 544 F.3d 8, 17 (1st Cir. 2008); *Quinn v. City of Boston*, 325 F.3d 18, 30 (1st Cir. 2003) (generally recognizing discretion of district court judge, but granting no deference to his interpretation, because the judge did not exercise his discretion in interpreting the decree at issue).

[13] Because GE seeks to show that EPA incorrectly allocated costs under the Decree, it bears the burden of proof in this action. C. Mueller & L. Kirkpatrick, Evidence § 3.1, at 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims."). The First Circuit endorses this rule. *See, e.g., Hernandez-Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 176 (1st Cir. 2011) (defendant employer must affirmatively prove that damages caps apply in Title VII claim);

alleged process set forth in the Decree for selecting a Remedy, and therefore any costs EPA incurred are not recoverable. As shown below, neither argument has merit.[14]

I. EPA properly allocated $1.2 million in FY 2011 costs to Future Response Costs.

Under the Decree EPA will select a Remedy, consistent with CERCLA, RCRA, and accompanying regulations, and GE shall implement that Remedy. CD ¶¶8.c, 22.n., 22.z; Permit II.J. In accordance with the obligations set forth in the Decree, approximately $1.2 million of EPA's FY 2011 costs fall into the recoverable Future Response Costs category.

A. The costs of NRRB work are Future Response Costs ($366,930).

GE claims that the costs of the NRRB work should have been allocated to either Future ROR Capped Response Costs or capped Oversight Costs. GE Mem. 17-18. A fair reading of the cost definitions and a full understanding of the underlying facts demonstrates that these costs are Future Response Costs – and, therefore, fully recoverable under the Decree.

1. Summary of NRRB work.

As discussed above, in FY 2011, Region 1 worked on preparing a proposed Remedy, and submitted a package for NRRB consideration in June 2011. Tagliaferro Dec. ¶16. The NRRB evaluates the proposed cleanup approach for any site where the potential Remedy costs exceed

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Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589 (1st Cir. 1979) ("[N]ormally the party asserting the affirmative of a proposition should bear the burden of proving that proposition.").

[14] GE's mention of EPA's cost estimates in the United States' Motion to Enter the Decree, including the $5 million estimate for Future Response Costs, should be placed in context. GE Mem. 11, n 11. First, the numbers provided by EPA were only estimates. Second, if the estimate for the Future Response Costs category was low, so too were the estimates for the capped categories of costs – by well over $50 million. Tagliaferro Dec. ¶¶29-30. While EPA accepted the risk on the capped categories, GE accepted the risk on the uncapped Future Response Cost category. This Court found the Decree to be fair. Order at 3.

$25 million with the goal of controlling costs and promoting consistency. Achieving these goals entails review of proposed remedies before they are released for public comment. *See* n 8, above. For complex contaminated sediment sites, such as this one, proposed remedies are also reviewed by EPA regional and headquarters representatives on EPA's Contaminated Sediments Technical Advisory Group ("CSTAG"), as was the case here. Tagliaferro Dec. ¶41 (Because CSTAG members participated in the NRRB review, references to "NRRB" herein include CSTAG.) The NRRB issued its recommendations to the Region in October 2011 regarding the Region's preferred Remedy. *Id.* ¶18.

2. The Future Response Costs Definition is a broad "catch-all" category that includes NRRB costs.

Costs for the FY 2011 NRRB work related to EPA's review, preparation and approval of a preferred Remedy are Future Response Costs. The Future Response Costs definition covers all costs incurred pursuant to the Decree that are not included within any capped cost definitions. Tellingly, GE omits the following emphasized phrases from its summary of the definition:

> U.S. Future Response Costs are ***all direct and indirect*** costs that EPA and DOJ incur 'pursuant to the provisions of this Consent Decree,' ***including but not limited to*** …***non-field work*** costs incurred for preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action ***(including responding to public comments thereto), and costs Incurred to develop plans or reports pursuant to the provisions of this Consent Decree that do not fall within the categories of costs excluded from U.S. Future Response Costs by the last sentence of this definition*** … 'U.S. Future Response Costs" expressly excludes "U.S. Oversight Costs' and 'U.S. Future Rest of River Capped Response Costs.' Costs in this category are not capped.

CD ¶4 (emphasis added) *contrast with* GE Mem. 5 (summarizing, but omitting key provisions, of the definition). This definition is a catch-all provision that includes ***"all"*** costs incurred under the Decree that do not fall within the capped categories. The definition **includes, but is not limited to** several examples of such costs.

One such example of Future Response Costs is "***non-field work*** costs incurred for preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action (including responding to public comment thereto)." CD ¶4 (emphasis added). GE erroneously suggests this clause is limited to work to "write the documents for [EPA's] proposal or to respond to public comments on that proposal." GE Mem. 10-11, 16. Such an interpretation fails to give full effect to each part of the definition.

A fairer interpretation, one that includes the preparation necessary to propose the Remedy and respond to public input, avoids rendering any Decree language superfluous. The words "preparing," "reviewing," and "approving" are most naturally read to include the thought processes, discussion, and decision-making procedures that go into the decision documents; to confine them to the mere writing of the document would not give the words their most obvious meaning.

Moreover, the Decree specifies that Future Response Costs includes "*non-field work* costs incurred . . . ." in connection with selecting a Remedy. CD ¶4 (emphasis added). The use of "*non-field work*" to modify the phrase "preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action" indicates that Future Response Costs encompasses costs well beyond the mere writing of documents; otherwise, this term would be superfluous. (GE does not mention "non-field work" anywhere in its Memorandum.) It is a "cardinal principle of contract construction" that "a document should be read to give effect to all its provisions and to render them consistent with each other."[15]

[15] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). *Also see, e.g.*, *F.D.I.C. v. Singh*, 977 F.2d 18, 22 (1st Cir. 1992) (citations omitted) (refusing "to infer a construction that would render an express clause in the documents nugatory"); *Medlin Const. Group, Ltd. v. Harvey*, 449 F.3d

The definition also lists other specific examples of Future Response Costs. But these examples are not limits. Any costs "incurred pursuant to the provisions of the Consent Decree" are recoverable Future Response Costs, unless included within one of the capped cost categories. CD ¶4. Given its ordinary definition, "pursuant to" means "in compliance with; in accordance with; under" or "in carrying out."[16] Costs incurred pursuant to the Decree should encompass not only the costs of steps specifically listed in the Decree but also those "in accordance with" or incurred "in carrying out" the Decree provisions.[17]

In sum, the definition of Future Response Costs was drafted broadly to include **"all"** costs incurred pursuant to the Decree that are not included within the capped costs definitions.[18] Accordingly, only two criteria need be satisfied for costs to be deemed Future Response Costs: (1) the costs were incurred pursuant to the Consent Decree (and the NRRB costs were); and

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1195, 1200 (Fed. Cir. 2006) ("A reasonable interpretation must 'assure that no contract provision is made inconsistent, superfluous**,** or redundant.'" (citation omitted)); Restatement (Second) of Contracts § 203 (giving preference to "an interpretation which gives a reasonable, lawful, and effective meaning to all the terms" over one that "leaves a part unreasonable, unlawful, or of no effect.").

[16] *Black's Law Dictionary* (9th ed. 2009); *see also Merriam Webster*, http://www.merriam-webster.com/dictionary/pursuant%20to (defining "pursuant to" as "in carrying out; in conformity with") (last visited April 12, 2013).

[17] *See, e.g.*, *United States v. Lee*, 659 F.3d 619, 622 (7th Cir. 2011) (interpreting "pursuant to" to mean "in accordance with" for purposes of the Consumer Credit Protection Act); *Tennessee Gas Pipeline Co. v. FERC*, 17 F.3d 98, 103–04 (5th Cir. 1994) (rejecting a more restrictive interpretation of "pursuant to" in gas pipeline contract and adopting "in carrying out" as a more appropriate reading).

[18] Because the Decree's framework requires GE to reimburse EPA for all Future Response Costs that are not within a defined capped cost exception, GE, as a party seeking the benefit of these capped cost categories, bears the burden to prove that these exceptions apply. *See United States v. JG-24, Inc.*, 331 F. Supp.2d 14, 69 n 34 (D.P.R. 2004) ("The burden of establishing the applicability of an exemption under the RCRA regulations is on the person claiming the exemption."); *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (generally the burden of proof falls on the party claiming the benefits of an exception to a statute). Requiring GE to prove that the costs fall within an excluded capped category appropriately "aligns the burden with the benefit." *Interex Corp. v. Atl. Mut. Ins. Co.*, 874 F.

(2) the costs do not fall within a capped cost category (and the NRRB costs do not).

3. NRRB costs were incurred pursuant to the Decree and therefore satisfy the first criterion for Future Response Costs.

GE argues that none of the NRRB costs fall within the specifically enumerated or listed types of Future Response Costs. GE Mem. 18. But that is not the standard. The question is whether the costs are (1) pursuant to the Decree; and (2) within any of the capped categories.

The NRRB costs here were incurred pursuant to the Decree. Under the Decree, EPA will propose a Remedy for public consideration, CD ¶22, and it is inherent in that process that EPA will deliberate before doing so, including obtaining review by the NRRB, which was publicly established in 1995. *See* n 9, above. Here, the primary purpose of Region 1's presentation of its preferred Remedy to the NRRB was to advance EPA's efforts to select a Remedy. Tagliaferro Dec. ¶17. EPA's National Remedy Review Board's very name describes its purpose: to *review remedies*. As such, this work falls within the specifically enumerated example of Future Response Costs that includes "preparing, reviewing, and approving" EPA's proposed selection of a Remedy.

And even if these costs did not fall within the specifically listed types of Future Response Costs, the NRRB costs were nonetheless incurred "pursuant to the provisions of the Decree" which contemplate that EPA will consider, propose, and select a Remedy. As such, the NRRB costs fall within the "catch-all" umbrella of costs incurred under the Decree. And, as explained below, none of these costs are within any capped cost category.

4. The NRRB costs are not Future ROR Capped Costs.

GE claims that the NRRB costs constitute "peer input," or "peer review" and are

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Supp. 1406, 1417 (D. Mass. 1995).

therefore within the definition of Future ROR Capped Costs. GE Mem. 17. But such costs are only capped "insofar as such costs were incurred *for* the activities" described earlier in the definition. CD ¶4 (emphasis added). Here none of the NRRB costs were incurred for any of the activities described earlier in the definition. The NRRB costs were not incurred "in connection with studying or otherwise investigating the Rest of River." CD ¶4. The NRRB was not studying or investigating the ROR; it was reviewing and commenting upon the Region's preferred Remedy. Tagliaferro Dec. ¶18. And the NRRB costs were not incurred in connection with "*field work* to support the preparation, development, and selection of the Rest of River Remedial Action." CD ¶4 (emphasis added). GE again selectively cites to a cost definition, in this case the Future ROR Capped Costs category, without including the definition's qualification related to "field work." *Contrast* CD ¶4 *with* GE Mem. 12 (omitting definition's key term). In fact, this capped category is specifically limited to "*field work* to support the preparation, development, and selection" of the Remedy. The NRRB costs are not "field work."[19]

Accordingly, the NRRB costs were not incurred for any activities within the definition of Future ROR Capped Costs.

5. The NRRB costs are not Oversight Costs.

Alternatively, GE claims that the NRRB costs are Oversight Costs because they are "review" of the RCMS and/or "supplemental or shadow studies" for "studies to be conducted by [GE under the Permit]." GE Mem. 17-18; CD ¶4. This argument is without merit.[20]

[19] GE also opens by suggesting that the United States agreed to cap its costs for "evaluating cleanup alternatives" for the River. GE Mem. 1-2. But no capped cost category includes EPA's costs for "evaluating cleanup alternatives" in connection with deliberating to select a preferred Remedy.

[20] EPA did incur costs in FY 2011 to develop computer modeling studies. EPA already allocated the

GE claims that because the NRRB considered all the alternatives set forth in the RCMS, and not just Region 1's preferred alternative, the NRRB was therefore "reviewing" or "overseeing" the RCMS within the meaning of the Oversight Costs category. GE Mem. 17-18. The definition of Oversight Costs includes: "reviewing [reports submitted by GE under the Permit], …**,** and otherwise **overseeing** [GE's] activities under that Permit." CD ¶4 (emphasis added). Under GE's reading of the definition, anytime EPA looked at, or read the RCMS, such conduct was RCMS "review" or "oversight" and not recoverable. Such an interpretation is not correct.

As set forth in the Oversight Costs definition, the meaning of "reviewing" reports must be understood in the context of "otherwise overseeing" or supervising GE's activities under the Permit. CD ¶4.[21] Here, "review" means "to examine or study again;" "to go over or examine critically or deliberately," [22] with the purpose of "otherwise overseeing GE's activities under the Permit." CD ¶4. Giving the definition of Oversight Costs its natural meaning limits such costs to overseeing and supervising GE's work under the Permit.

The NRRB's primary purpose was to review Region 1's recommendation of a preferred Remedy for consistency with law, regulation, and guidance. NRRB guidelines provide that all site information packages should include, among other information, the range of alternatives

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costs of such work to Oversight Costs. Tagliaferro Dec. ¶40. GE is mistaken to dispute the costs sought here on this ground. GE Mem. 13-14.

[21] To "oversee" means to "inspect, examine; ***supervise.***" *Merriam-Webster*, http://www.merriam-webster.com/dictionary/oversee, 2a (last visited April 12, 2013) (emphasis added).

[22] *Merriam-Webster*, http://www.merriam-webster.com/dictionary/review, 2, 4a (last visited April 12, 2013).

considered, a preferred remedy, and any technical submissions from potentially responsible parties ("PRPs"). Tagliaferro Dec. ¶¶15-18. Contrary to GE's assertion, inclusion of the alternatives discussed in the RCMS in the NRRB Site Information Package was not for the primary purpose of "reviewing," "overseeing," or supervising the RCMS. It was an appropriate inclusion to facilitate the NRRB's evaluation of Region 1's preferred remedy. *Id.*

Alternatively, GE mistakenly claims that the NRRB work was a "shadow or supplemental" study. The Oversight Costs category, in fact, only applies to "shadow or supplemental studies ***for*** the studies to be conducted by [GE] ***under the RCRA Permit***." CD ¶4 (emphasis added). Given its ordinary definition, "for" is "used as a function word to indicate purpose."[23] Accordingly, not all studies conducted by EPA under the Decree are within the Oversight Costs category, only those studies undertaken *for the purpose of* supplementing or shadowing studies required to be conducted GE under the Permit.

Here, the analysis undertaken by the NRRB to review *EPA's* preferred Remedy was not a "study," but a review of Region 1's preferred Remedy. Tagliaferro Dec. ¶18. And even if it were a "study," it was a study of Region 1's preferred Remedy, which is not one of GE's obligations under the Permit. Although GE was required to conclude the RCMS with its opinion regarding what Remedy is best suited to satisfy the Permit criteria, no Permit obligation requires GE to propose a remedy for EPA: EPA remains the ultimate judge of whether a Remedy is protective of human health, the environment, and public welfare. In relevant part, Oversight Costs only applies to shadowing or supplementing studies to be conducted by GE under the Permit, and the NRRB work assisted Region 1 in its unique qualification to propose a preferred

[23] *Merriam Webster*, http://www.merriam-webster.com/dictionary/for. (last April 12, 2013).

Remedy for public comment. Such work is not an "Oversight Cost."[24]

B. The costs of the Situation Assessment, workshops, and charrette work are Future Response Costs ($418,560).

GE also claims that the costs of the Situation Assessment, workshops, and charrette should have been allocated to Oversight Costs. GE Mem. 15-16. A fair reading of the cost definitions and a full understanding of the underlying facts demonstrate that these costs (1) were incurred pursuant to the Decree; and (2) are not within the Oversight Costs category.

1. Summary of Situation Assessment, workshops and charrette work.

EPA undertook the Situation Assessment, workshops, and charrette for the primary purpose of engaging the public in EPA's process of developing a preferred Remedy. EPA first hired a contractor to conduct a Situation Assessment to: interview the public in part to solicit input on remediation options for EPA to consider; address any technical questions; and facilitate EPA's engagement with the public. Based in part on the interview findings, EPA held three workshops to provide information to the public, focusing on the nature of the Housatonic River; PCBs, risks, and modeling; and remediation and restoration technologies. Finally, EPA held a full-day, interactive community workshop, known as a "charrette," to gain public input and discuss the ROR cleanup and Remedy selection process. Collectively, this work informed the public and obtained public participation regarding the process of selecting a Remedy under the Decree. Tagliaferro Dec. ¶¶7, 9-10, 12.

[24] EPA allocated a portion of its work related to the NRRB (10%) to Oversight Costs to the extent this work can be fairly characterized as falling within that definition because the costs were allegedly "review," "oversight," or supervision of the RCMS. CD ¶4. No greater allocation is appropriate, since the primary purpose in incurring these costs was to obtain the NRRB's review of Region 1's recommendation

2. The Situation Assessment, workshops, and charrette costs were incurred pursuant to the Decree and therefore satisfy the first criterion for Future Response Costs.

The public outreach costs at issue were incurred pursuant to the Decree. Consideration of the public interest is inherent in EPA's process of selecting a Remedy pursuant to the provisions of the Decree and EPA guidance. CD ¶¶22, 213, 214; n 8, above. The Situation Assessment, workshops, and charrette provided public participation regarding potential recommended remedies, and the primary purpose of this effort was to inform EPA's selection of a preferred Remedy. Tagliaferro Dec. ¶12. Such costs are within one of the specifically listed examples of recoverable Future Response Costs as they are "non-field work costs incurred for preparing, reviewing, and approving the documents that propose and select the Rest of River Remedial Action (including responding to public comment thereto)." CD ¶4. In addition, these costs are also within the example of costs incurred "to develop plans or reports pursuant to the provisions of this Consent Decree that do not fall within [the capped categories]," such as community relations reports. *Id*. Here, EPA's subcontractor generated a report summarizing the Situation Assessment, workshops, and charrette. Tagliaferro Dec. ¶14. Accordingly, these costs were incurred under the Decree as one of the types of enumerated Future Response Costs.

But even if this Court finds that such public outreach falls outside the specifically listed examples of Future Response Costs, this public outreach is nonetheless within the broad catch-all umbrella of costs incurred pursuant to the Decree. Under the Decree, EPA is charged with selecting a Remedy that is protective of human health, the environment and public welfare: Consideration of public input, and coordination with the public, on any potential Remedy and its

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of a preferred Remedy. CD ¶4; Tagliaferro Dec. ¶36.

implementability is an inherent component of the Remedy selection process under governing environmental statutes, regulations, guidance and the Decree. CD ¶¶ 22, 213, 214; *see* n 8, above. Here, EPA's FY 2011 costs to inform and involve the community in the process of selecting a Remedy fall within the catchall phrase "all" costs incurred "pursuant to the provisions of the Consent Decree."

3. These public outreach costs are not Oversight Costs.

GE argues that the disputed public outreach efforts during EPA's process of developing a preferred Remedy constitute "review" or "oversight" of GE's work on the RCMS and/or a "supplemental or shadow" study of cleanup alternatives. GE Mem. 16. This claim is based upon an incorrect reading of Oversight Costs and a mischaracterization of the facts.

a. These public outreach costs were not incurred for "review" or "oversight" of GE's work on the RCMS.

GE argues that because EPA was considering and discussing differing levels of cleanup activity during its public outreach effort – rather than focusing on a single preferred Remedy – therefore EPA was "reviewing," "overseeing," or otherwise supervising the RCMS within the meaning of the Oversight Costs definition. GE Mem. 15-16. [25] GE strains the meaning of

[25] GE's syllogism is flawed. Even if EPA's outreach effort allegedly does not fall into one of the specifically enumerated categories of Future Response Costs, the work was nonetheless "pursuant to the Decree," and therefore qualifies for the first criterion of a Future Response Cost. The second criterion is simply whether the work falls into any of the capped categories. Whether EPA was seeking input on several cleanup alternatives – or just one – does not automatically transform this work into "review," "oversight," or supervision of the RCMS. The meaningful question is why EPA was engaged in this public outreach effort.

None of GE's quotes of EPA regarding the number of alternatives under consideration during the public outreach effort (and the NRRB review) demonstrate that the purpose of this work was to oversee GE's work on the RCMS. GE Mem. 12-13, 15-17. Indeed, GE's own paraphrasing of the quotes confirms that "the purpose of these activities was to describe for the public, and gather input from the public on, the alternatives that EPA was evaluating." GE Mem. 15. And the primary purpose of this work

"review" in the context of the Oversight Cost definition to suggest that the outreach effort was for the purpose of "reviewing" or "overseeing" GE's work on the RCMS. Oversight Costs include costs incurred for "*reviewing* proposals, reports, studies and other deliverables submitted by [GE], … and *otherwise overseeing* [GE]'s activities under that Permit." CD ¶4 (emphasis added). As discussed, however, anytime EPA considered, looked at, read, or reviewed the RCMS, such activities did not automatically constitute Oversight Costs unless the purpose was to "review," "otherwise oversee," or supervise GE's activities under the Permit. Here, EPA's primary purpose was not to supervise or oversee GE's work on the RCMS, its methodology or design. Tagliaferro Dec. ¶¶12-13. Indeed, the work related to EPA's actual review and oversight of GE's work on the CMS and RCMS was undertaken as a separate task.[26]

The primary purpose of this work was to facilitate Region 1's decision-making to develop a preferred Remedy. Tagliaferro Dec. ¶12. Indeed, soliciting public input for a complex and substantial remedial action, before formally proposing a Remedy to the public, is consistent with EPA guidance. *See* n 8, above. While the RCMS may have served as a springboard for these discussions, the primary goal of these outreach efforts was not for EPA to review, supervise, or otherwise oversee GE's work on the RCMS. Tagliaferro Dec. ¶13. This outreach effort was not an Oversight Cost.

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was to facilitate EPA's decision-making regarding a preferred Remedy, not oversight. Tagliaferro Dec. ¶¶12-13.

[26] This work began with the review of GE's original CMS in 2008, including EPA's comments and requests for revisions that resulted in GE's 2010 revised CMS (a/k/a the RCMS). EPA allocated the costs of this work and review of the RCMS in FY 2011 to Oversight Costs. Tagliaferro Dec. ¶39.

b. These public outreach costs were not incurred for "supplemental or shadow" studies *for* work GE was required to undertake under the Permit.

GE argues, in the alternative, that these outreach efforts were "supplemental or shadow" studies for the RCMS and are therefore Oversight Costs. GE Mem. 16. But the public outreach was not a shadow or supplemental study for any study to be undertaken by GE under the Permit. The Permit does not require GE to conduct any studies of the community's views of the various corrective measures alternatives.

Not surprisingly, it is within EPA's expertise and jurisdiction – protection of public health, welfare, and the environment – to assess and weigh how the community responds to various remedial alternatives. EPA undertook the public outreach effort mainly because it was beneficial to obtain a preliminary read on the communities' opinion of various alternatives *before* EPA presented its recommended Remedy to the NRRB and the public. Tagliaferro Dec. ¶12. Early community involvement can provide greater community acceptance, which reduces the likelihood that the public may reject a proposed cleanup, leading to a costly and time-consuming effort to re-propose a cleanup alternative. *See* n 8, above. None of this work was to shadow or supplement a study that GE was required to undertake under the Permit. Tagliaferro Dec. ¶13.

c. These public outreach costs were not "community relations" costs related to any activities within the Oversight Costs category.

Finally, GE claims that because the Oversight Costs category includes "community relations," the costs incurred for the Situation Assessment, workshops, and charrette are Oversight Costs. GE Mem. 16., n 21. But the only community relations costs within the Oversight Costs definition are those which are incurred "for the activities described" in the

definition of Oversight Costs. CD ¶4. Because the disputed costs are not related to "activities" described in the Oversight Costs category, the public outreach costs are Future Response Costs.[27]

C. The time of certain EPA employees are Future Response Costs ($147,044).

GE objects to the time that certain EPA employees allocated to Future Response Costs related to "Remedy preparation." GE Mem. 19. Namely, the allocations by EPA's technical project manager for the Site (Dean Tagliaferro) of $53,544 out of $192,639 (28%) of his total FY 2011 Site time; the allocations by EPA's lead attorney for the ROR (Timothy Conway) of $84,000 out of $118,257 (71%) of his total FY 2011 Site time; and other allocations by attorneys from EPA's legal office. Tagliaferro Dec. ¶¶42-43. This objection is premised on GE's mistaken claim that no EPA employee time related to developing a preferred Remedy should have been allocated to Future Response Costs because this work was allegedly for tasks that fall within capped categories. In fact, as discussed above the disputed costs are recoverable because the costs relate to tasks that (1) were incurred pursuant to the Decree; and (2) are not within any capped category. These individuals allocated and billed their time as required under the Decree -- and no further documentation is required. CD ¶100.h (no additional documentation required).[28]

[27] EPA allocated a portion of its work related to the Situation Assessment, workshops, and charrette (20%) to Oversight Costs to the extent this work can fairly be characterized as falling within that definition because the costs were allegedly community relations costs incurred for the "review," "oversight," or supervision of the RCMS. CD ¶4. No greater allocation is appropriate, since the primary purpose in incurring these costs was to obtain public input on potential remedies for Region 1's work to propose a Remedy. Tagliaferro Dec. ¶35.

[28] If this Court rules that any of the NRRB, Situation Assessment, workshops, or charrette costs in dispute are not properly allocated to Future Response Costs, the United States requests the opportunity to provide additional information regarding how these individuals spent their time in FY 2011, and re-allocate their

D. DOJ costs are Future Response Costs ($87,000).

GE objects to DOJ costs allocated to Future Response Costs. GE Mem. 19-20. In doing so, GE ignores a distinction in the Decree's terms. Among the cost categories at issue here, the uncapped Future Response Costs category is unique in that it applies to costs incurred by "EPA" and "***DOJ***." By contrast, the Oversight Costs and Future ROR Capped Response Costs categories only refer to costs incurred by "EPA." Accordingly, under the Decree EPA employees allocate their time among these cost categories (and others) – but no such requirement is imposed on DOJ employees. *Contrast* CD ¶100.d.ii.*with* ¶100.e. The distinctions among these cost categories must have meaning.

GE's request for more information on the nature of the work provided to EPA by DOJ is contrary to the billing procedures established by the Decree. The Decree only requires, in relevant part, that the bill include "a statement that the costs included on the bill are compiled from the EPA or DOJ accounting system and represent only costs incurred in connection with the Site, for the appropriate cost category. . . ." CD ¶100.g. The FY 2011 bill provided such a statement. And the Decree explicitly establishes that "no additional documentation, beyond that specified in subparagraphs a. through g. above, shall be required to establish the amounts Incurred." CD ¶100.h.

E. The CCC costs are Future Response Costs ($22,080).

GE contests $22,080 of the disputed costs related to meetings of the Citizens Coordinating Council ("CCC"), claiming that such costs are Oversight Costs. GE Mem. 20-21.

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time according to this Court's ruling.

But the disputed CCC costs (1) were incurred "pursuant to the Decree;" and (2) are outside any of the capped categories.

In 1998, EPA established the CCC to inform the public and obtain public input concerning the Site's cleanup efforts. CCC members include GE, EPA, the States, local officials, and representatives from advocacy groups. Tagliaferro Dec. ¶47. Community outreach through the CCC is expressly contemplated by the Decree, including GE's cooperation and participation in such community relations efforts. CD ¶¶ 4, 213 and 214. Thus, these costs satisfy the first criterion for Future Response Costs, in that they were incurred "pursuant to" the Decree.

And, the disputed costs do not fall within any capped cost category. None of the costs for the meetings at issue were for the primary purpose of "reviewing," "overseeing," or supervising work submitted by GE under the Permit. Tagliaferro Dec. ¶47. As specified in Decree Paragraphs 213 and 214, the primary purpose of the EPA's meetings with the CCC was to provide information regarding the work to the public, including the status of the ROR and other Site cleanups. Tagliaferro Dec. ¶47.[29]

[29] EPA allocated a portion of work related to CCC costs (20%) to Oversight Costs to the extent this work can be fairly characterized as falling within that definition because some of the CCC meetings included some input from the public that assisted EPA in its "review," "oversight," or supervision of the RCMS and/or removal actions outside of the River. CD ¶4. No greater allocation is appropriate since the primary purpose in incurring these costs was to provide information regarding the work to the public, including the status of the ROR, and other Site cleanups. Tagliaferro Dec. ¶37.

F. Records management costs are Future Response Costs ($43,680).

GE argues that the costs EPA incurred through its records management contractor, ASRC, are not Future Response Costs. GE Mem. 24-25. However, these costs (1) were incurred pursuant to the Decree; and (2) are not within any capped cost category.

1. Records management costs were incurred pursuant to the Decree and therefore satisfy the first criterion for Future Response Costs.

One of the specifically listed examples of Future Response Costs is the cost of "enforcing" the Decree. CD ¶4. Given its ordinary definition, the meaning of "enforce" includes "to carry out effectively."[30] EPA's management of records enables it to carry out effectively its obligations and responsibilities under the Decree by ensuring that information is available when needed, including, but not limited to, during dispute resolution and judicial adjudication of issues**.** GE incorrectly argues that these costs are unrecoverable because there is no pending or foreseeable enforcement action. GE Mem. 24. If EPA had to wait to manage, prepare, and organize its records until there was a live or foreseeable enforcement action, it would likely be too late. Moreover, managing records is an inherent and critical function in some of the other specifically enumerated types of Future Response Costs such as "dispute resolution," "Review of Response Actions," and "Work Takeover." CD ¶4. To date, GE has invoked dispute resolution at least nine times, so enforcing the Decree and relying upon records management for an enumerated Future Response Costs category (dispute resolution) is not a hypothetical scenario. Tagliaferro Dec. ¶51.[31]

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[30] *Merriam Webster***,** http://www.merriam-webster.com/dictionary/enforce (last visited April 12, 2013).

[31] GE challenges EPA's decision to digitize Site information requested by EPA and provided by GE. Yet, this information might be necessary under the provisions of the Decree regarding Review of

Even if records management costs did not fall within an enumerated example of Future Response Costs, the costs fall within the "catch-all" definition of all costs incurred under the Decree, excluding only certain capped categories. Here, EPA incurred these costs to carry out and implement the Decree.

2. Records management costs do not fall within any capped cost category.

Records management costs also meet the second criterion: these costs do not fall within any capped category. Here, the central purpose of the records management costs in dispute does not meet any of the criteria specified in any of the capped cost definitions. Tagliaferro Dec. ¶45.

GE contends that EPA's description of its records management work is vague and lacks supporting documentation. GE Mem. 24. But GE cites to no provision of the Decree that requires the level of additional information and detail demanded by GE. To the contrary, the Decree prescribes the documentation EPA must provide and expressly states that no further information is required. CD ¶100.h. EPA met its obligations under the Decree by providing cost summaries, the task order, and ASRC's monthly technical progress reports. CD ¶100.h; Tagliaferro Dec. ¶46. GE seeks to impose further burdens on EPA when nothing further is required by the Decree.[32]

Response Actions (Section X), including GE's obligation to perform additional work if Decree "reopener conditions" are satisfied. The "reopener" conditions depend, in part, on what information EPA knew and when, and the reopener conditions expressly reference the information that GE provided to EPA. CD ¶165. This information may also be relevant to the general enforceability of the Decree, including the scope of the United States' covenant which applies, in relevant part, "where such Waste Materials originated at the GE Plant Area." CD ¶161.a.

[32] As the party instigating this dispute, the burden is on GE to show that EPA has insufficiently documented its costs under the Decree. *Cf. Muniz-Olivari v. Stiefel Laboratories, Inc.*, 496 F.3d 29, 38 n 7 (1st Cir. 2007) ("plaintiff has the burden of proof to show that there was a contract and a breach.").

In sum, these records management costs are recoverable in that they were incurred under the Decree, and they do not fall within any capped cost category.[33]

G. EPA's allocations are consistent with the Decree's billing procedures.

GE claims that EPA's FY 2011 allocations it made during dispute resolution – of portions of certain costs including 35% of records management costs, 20% of CCC costs, 20% of public outreach costs, and 10% of NRRB costs, to capped or cross-cutting categories[34] – were arbitrary or implausible. GE Mem. 18, 20. In considering that EPA has already allocated over $74 million to unrecoverable capped cost categories, GE's accusations are unfounded. Tagliaferro Dec. ¶30.

EPA carefully allocated its costs during dispute resolution. For example, in making such allocations, EPA reviewed employee and contractor time and cost records, and if appropriate supporting documentation, such as minutes of meetings, or other available information. EPA discussed the work with the relevant employees and considered the nature of the work, including the purpose of the work, the effort, and the definitions of the Decree. Based upon these discussions with the individuals with first-hand knowledge and experience of the events, and review of any supporting documentation, EPA estimated the percentage of time or work that

[33] EPA allocated a portion of its records management costs (35%) to the cross-cutting costs category to the extent this work can be fairly characterized as "costs incurred in support of tasks included in more than one cost category." CD ¶100.f. For example, an EPA project manager may have used the records management system to retrieve documents for the purpose of "reviewing," "overseeing," or supervising GE's work at the Site. No greater allocation is appropriate, since the primary purpose in incurring these records management costs was to carry out the provisions of the Decree. Tagliaferro Dec. ¶38.

[34] The "cross-cutting cost category" refers to costs that fall within multiple categories, such as the cost of a field office. CD ¶100.f. EPA uses an established formula for calculating cross cutting costs, and GE has not disputed this formula. If this Court determines that any costs were improperly allocated to Future Response Costs, EPA will re-calculate cross-cutting costs accordingly and based upon this formula.

could fairly be characterized as belonging in a capped or cross-cutting category. Tagliaferro Dec. ¶¶33-34.[35]

Further, EPA has provided GE with detailed information regarding the disputed costs. The Decree lists the billing information that EPA is to provide to GE. CD ¶100.a-g. EPA has provided contractor cost summaries, invoices, progress reports, and itemized listings of labor costs totaling hundreds of pages. Tagliaferro Dec. ¶52. EPA also provided GE "a brief explanation of any allocation methodology used to allocate costs Incurred in support of tasks included in more than one cost category." CD ¶100.f.; EPA's Statement of Position 11-13, 17, Ex. 6. The Decree provides that "no additional documentation, [beyond the specifications of paragraph 100.a.-g.] shall be required to establish the amounts Incurred." CD ¶100.h. EPA has sufficiently documented its costs, and GE has not met its burden to prove otherwise.

II. EPA's cost recovery and process of proposing a recommended Remedy are supported by the Decree and environmental law.

GE argues that EPA improperly leapfrogged a decision on the RCMS, including the dispute resolution process on the RCMS, by initiating work to recommend a preferred Remedy before making a decision on the RCMS, and that therefore any such costs are not "pursuant to the provisions of the Decree." GE Mem. 21-23. This argument is not supported by the Decree, or environmental laws, which recognize EPA's expertise, and flexibility, in establishing the process for recommending clean-up decisions to protect human health, the environment and

[35] EPA followed a similar process in making its original FY 2011 cost allocations prior to billing GE, but made these additional adjustments or corrections based upon issues raised by GE in dispute resolution. Tagliaferro Dec. ¶34.

public welfare.[36] GE's "leapfrog" or "red-light/green-light" argument reads into the Decree an implied condition precedent by attempting to impose an inefficient rigid linear structure upon EPA's multi-faceted and concurrent decision-making process.

A. No provision of the Decree limits EPA's Remedy selection process at issue and such costs are recoverable.

Both the Decree and the Permit allow EPA to initiate its Remedy selection process before providing GE with a decision on the RCMS – and the Decree requires GE to reimburse EPA for such costs. Decree Paragraph 22.n only requires that EPA formally *propose* a Remedy to the public (an event that has not yet occurred) upon satisfactory completion of the CMS. Indeed, GE points to no specific violation of any process required by the Decree during FY 2011, because there were none.[37]

Further, the definition of Future Response Costs contains no restriction, either express or implied, that any such costs are recoverable only if they are incurred after EPA formally acts on the RCMS. By contrast, some of the capped cost definitions contain detailed terms limiting costs by dates and deadlines. For example, Future ROR Capped Response Costs requires that such costs be incurred after March 31, 1999 but before selection of the Remedy, and the definition of

[36] Technical questions, such as the proper process for selecting a remedy, are within EPA's technical expertise to which courts typically defer. *See Environmental Defense Fund v. EPA*, 210 F.3d 396, 400 (D.C. Cir. 2000) (courts should defer to agency expertise on technical questions); *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1539 (D.C. Cir. 1989) (fundamental principle that on "a highly technical question...courts necessarily must show considerable deference to an agency's expertise.") (quotes and citations omitted).

[37] GE's claims that (1) Paragraph 22.n. "requires completion of the CMS process *before* EPA develops" a Remedy proposal, GE Mem. 22 (emphasis in GE Mem.); and "the CMS process must be satisfactorily completed before EPA embarks on developing a remedy proposal." GE Mem. 23. But the actual language of Paragraph 22.n. provides only that "upon satisfactory completion of the [CMS], EPA will issue [its proposed draft Permit modification]." The Decree contains no prohibition on EPA's initiation of its process to deliberate and develop a preferred Remedy.

Oversight Costs contains similar explicit temporal limitations. The definition of Future Response Costs does not provide that EPA must act on the RCMS before it can incur costs in this category. GE cannot now insert, *post hoc*, limitations into the definition of Future Response Costs.

B. EPA's Remedy selection process is consistent with the Decree and environmental law, regulations, and guidance.

The Decree does not change the environmental regulations and guidance that EPA follows in selecting remedies for complex sites. GE's claim, that any costs "incurred outside the sequential process established in the Decree" were not incurred "pursuant to" the Decree, vests "pursuant to" with an unnecessarily restrictive meaning. GE Mem. 22. Costs incurred pursuant to the Decree encompass not only the costs of steps specifically mandated in the Decree but also those "in accordance with" or incurred "in carrying out" the Decree provisions.[38] Under the Decree, EPA will select a Remedy, and do so in accordance with governing environmental law, regulation, and guidance – a task involving the exercise of its administrative expertise.

EPA regulations and guidance provide EPA flexibility to begin preparation to propose a Remedy before completion of a RCRA corrective measures study, such as the RCMS, or a feasibility study, an analogous study under CERCLA. For example, the 1996 RCRA guidance on corrective action expressly emphasizes that RCRA Remedy selection is results-oriented, flexible, and not a lock-step process: Corrective action should "not be viewed as isolated steps in a linear process." 61 F.R. 19447 (May 1, 1996). In some situations, EPA may not even

[38] *See, e.g.*, *United States v. Lee*, 659 F.3d 619, 622 (7th Cir. 2011) (interpreting "pursuant to" to mean "in accordance with" for purposes of the Consumer Credit Protection Act); *Tennessee Gas Pipeline Co. v. FERC*, 17 F.3d 98, 103–04 (5th Cir. 1994) (rejecting a more restrictive interpretation of "pursuant to" in gas pipeline contract and adopting "in carrying out" as a more appropriate reading).

require submission or approval of a corrective measures study. *Id.* and at 19455. The elements of a RCRA corrective action are not "ends in themselves" and are "not prescribed steps along a path." *Id.* at 19443. Further, RCRA guidance states that the earlier that potential remedies can be identified "the more effectively information gathering can be focused." *Id*. at 19447. CERCLA guidance and regulations, which like the RCRA guidance cited above, pre-date entry of the Consent Decree, provide similar flexibility.[39] In short, it is within EPA's discretion to initiate Remedy selection before Remedy evaluation is absolutely final.

The work undertaken by EPA in FY 2011 as part of its Remedy selection process was consistent with regulation, guidance, and the Decree. EPA had spent years reviewing and overseeing GE's work on the CMS, and/or the RCMS, including providing comments, requesting additional information, and soliciting public feedback on the CMS and/or the RCMS.[40] EPA allocated the costs of this work to Oversight Costs. Tagliaferro Dec. ¶39.

But in FY 2011, EPA was also working on a separate task, namely the task of developing a preferred alternative. This included providing and soliciting opportunity for dialogue with the community regarding EPA's Remedy selection process through the Situation Assessment,

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[39] CERCLA regulations state, in describing proposed plans (the analogous document to the Statement of Basis and proposed Permit modification): "The selection of remedy process for an operable unit [a part of a remedial action] may be initiated at any time during the remedial action process." 40 CFR § 300.430(f)(2). The CERCLA regulations preamble also explains that "flexibility is needed in the remedy selection process" because each site "presents a different set of circumstances." 55 FR 8724 (March 8, 1990). EPA guidance on proposed plans also emphasizes flexibility and early identification of the preferred Remedy. See Page 2-1, *A Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents* (July 1999), Ex. 7. For example, this Guidance expressly states "***in some circumstances, a draft [proposed plan] can be developed as the RI/FS [an analogous study to the RCMS] is being finalized***." *Id.* (emphasis added).

[40] Once EPA issues its formal decision on the RCMS, if EPA disapproves or modifies all or a part of GE's RCMS, GE will have the opportunity to dispute that decision as provided under the Decree. CD ¶141.a.; Permit 27.

workshops, and charrette. *Id*. ¶12. Community involvement, such as the public outreach efforts at issue here, is specifically encouraged by EPA guidance *before* the formal public proposal of a recommended clean-up. Considering public concerns before EPA's formal public recommendation of a preferred remedy can lead to better, cost-effective decision-making, and is encouraged to facilitate early EPA response to community concerns, if possible. *See* n 8, above. Following this public outreach effort, Region 1 prepared a recommended Remedy for consideration by the NRRB, and the NRRB provided comments to the Region, to which the Region responded. *Id*. ¶¶15-18.

EPA believes that this Remedy selection process, comprised of concurrent phases, instead of a rigid sequential approach, is more efficient. *Id.* ¶49. It is encouraged by EPA guidance, and nothing in the Decree prohibits this concurrent approach. For example, initiating the process of developing a preferred alternative might inform EPA's final decision on the RCMS, especially given the complexity of the River, the numerous clean-up alternatives, and the multitude of interests at stake. Indeed, GE has asked to participate in the process of providing EPA input before EPA recommends a preferred alternative to the public. *Id*. ¶22.

Finally, courts grant agencies broad discretion in establishing the procedures relied upon to reach decisions.[41] No provision of the Decree changes the standards or expertise exercised by EPA in reaching its decisions to select a cleanup for the River. In sum, EPA's Remedy selection

[41] *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1544 (E.D. Ca. 1992) (upholding grant of license, emphasizing that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (internal quotation marks omitted)); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978) ("the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

process is authorized by guidance, efficient, and well within the bounds of the Decree and agency discretion in establishing procedures for decision-making. GE's description of a lock-step "sequential process" does not accurately reflect the terms of the Decree or the realities of EPA's task and discretion in selecting a Remedy for this complex Site. The costs at issue are Future Response Costs that (1) were incurred pursuant to the Decree; and (2) are not within any capped cost category.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm EPA's decision that GE is liable under the Decree to reimburse EPA for $1,239,108, plus Interest. CD ¶¶4, 101.

Respectfully submitted,

ROBERT G. DREHER
Acting Assistant Attorney General
Environment and Natural Resources Division

/s/ C. A. Fiske
Catherine Adams Fiske
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
One Gateway Center – Suite 616
Newton, MA 02458

CARMEN L. ORTIZ
United States Attorney
District of Massachusetts

Karen L. Goodwin
Assistant United States Attorney
District of Massachusetts

OF COUNSEL:
John W. Kilborn
Timothy M. Conway
Senior Enforcement Counsels
EPA New England
Post Office Square
Boston, MA 02109

CERTIFICATE OF SERVICE

I certify that this opposition was filed on April 12, 2013 through the Court's ECF system and was therefore electronically sent to the registered participants as identified on the Notice of Electronic Filing.

/s/ C. A. Fiske
Catherine Adams Fiske